

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID SOTO,

Petitioner,

No. CIV S-04-1432 LKK DAD P

vs.

EDWARD S. ALAMEIDA, et al.,

Respondents.

FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On February 8, 2005, respondents filed a renewed motion to dismiss the petition as untimely.¹ Petitioner has not filed any opposition to that motion and it is now before the court for decision. At issue is whether petitioner's habeas petition was timely filed based upon application of the mailbox rule set forth in Houston v. Lack, 487 U.S. 266 (1988) .

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¹ On August 27, 2004, respondents filed their first motion to dismiss the petition as barred by the statute of limitations. On February 4, 2005, findings and recommendations were issued recommending that the motion be denied without prejudice to the motion being renewed if supported by documents establishing the date the petition was delivered to prison authorities for mailing. On March 31, 2005, the assigned district judge adopted those findings and recommendations.

1 The following chronology was set forth in the court's findings and
2 recommendations filed on February 4, 2005.

3 1. Following a jury trial that resulted in his conviction, on August 17, 2001,
4 petitioner was sentenced in the Sacramento County Superior Court to an indeterminate aggregate
5 prison term of 82 years to life for first degree murder (Cal. Penal Code § 187(a)), with
6 enhancements for use of a firearm (Cal. Penal Code § 12022.53(d)) and prior prison terms (Cal.
7 Penal Code §§ 667(a) & 667.5(b)).

8 2. Petitioner filed a direct appeal to the California Court of Appeal for the Third
9 Appellate District. The judgment of conviction was affirmed on February 3, 2003, with an order
10 modifying the abstract of judgment to correct a clerical error.

11 3. On February 7, 2003, petitioner filed a petition for review with the California
12 Supreme Court. The petition was summarily denied on April 9, 2003.

13 4. The judgment became final on July 8, 2003. See Bowen v. Roe, 188 F.3d
14 1157 (9th Cir. 1999) (holding that when a petitioner has sought direct review of the judgment of
15 conviction with the California Supreme Court, the period of direct review includes the 90-days
16 within which a petitioner can file a petition for a writ of certiorari with the United States
17 Supreme Court, whether or not the petitioner actually files such a petition).

18 5. Petitioner did not file any state habeas petitions.

19 6. On July 21, 2004, petitioner's federal habeas petition was filed in this court.

20 In the findings and recommendations issued February 4, 2005, the court
21 determined that petitioner's habeas petition was signed on July 4, 2004 but that the record was
22 unclear as to the date the petition was delivered to prison authorities for mailing. The court noted
23 that if the petition was delivered to prison authorities for mailing prior to July 8, 2004, under the
24 Houston mailbox rule, the petition would be timely filed.

25 In support of their renewed motion to dismiss, respondents have submitted to the
26 court the mail log maintained at Salinas Valley State Prison which indicates that in on two

1 occasions in July of 2004, petitioner delivered legal mail addressed to the District Court to prison
2 authorities for mailing. (Resp.'t's lodged document #1, lodged on 2-9-05.) According to the
3 prison mail logs, petitioner had legal mail sent out only on July 16 and July 20, 2004. (Id.)
4 Respondents have also submitted the declaration a Maribel Lopez, supervisor of the mail room at
5 Salinas Valley State Prison, in support of their motion. (Resp.'t's lodged document #2, lodged
6 on 2-9-05.) Ms. Lopez states that pursuant to the prison's standard mail procedures had
7 petitioner delivered legal mail to prison staff on July 4, 2004, it would have been mailed to the
8 court by the prison no later than July 6, 2004. (Id. at 1-2.) Based upon the mail logs and the
9 declaration of Ms. Lopez, respondents argue that the petition filed with this court was submitted
10 to prison officials for mailing no earlier than July 14, 2004 and that the statute of limitations had
11 expired at least six days earlier thus rendering the petition time barred.

12 The prison mail log submitted by respondents in support of their motion is
13 consistent with the dates of petitioner's filings with this court. The prison mail log indicates that
14 petitioner's outgoing legal mail was sent on July 16, 2004. The court's records establish that five
15 days later, on July 21, 2004, the habeas petition was received in this court and filed.² The prison
16 mail log establishes that petitioner also had outgoing legal mail sent on July 21, 2004. The
17 court's records establish that petitioner's application to proceed in forma pauperis was received
18 by the court and filed on July 23, 2004. Despite having placed the date of July 4, 2004 on the
19 signature line of his petition, there is no record which even suggests that petitioner delivered his
20 habeas petition to prison authorities for mailing prior to July 8, 2004. The mail logs submitted
21 by respondents appear to preclude that possibility. Finally, petitioner has not provided any
22 opposition to respondents' renewed motion.

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26 ² The court was closed over the weekend of Saturday, July 17, 2004 and Sunday, July 18, 2004.

Accordingly, IT IS HEREBY RECOMMENDED that:

1. Respondents' renewed motion to dismiss, filed on February 8, 2005, be granted; and
2. This action be dismissed as barred by the statute of limitations.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fifteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within five days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: August 3, 2005.



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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